

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RAMON RENTERIA</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,006,849;
<b>IBP, INC.</b>	)	1,006,850
Respondent	)	
Self-Insured	)	
	)	

**ORDER**

Respondent appealed the April 2, 2003 preliminary hearing Order For Compensation entered by Administrative Law Judge (ALJ) Brad E. Avery.

**ISSUES**

Judge Avery found claimant suffered an accidental injury which arose out of and in the course of his employment with respondent. Specifically, the Judge found that claimant “aggravated a pre-existing back condition while bending over to retrieve low intestines out of a box.” Respondent points out that this specific incident occurred in August 2002 while claimant was assigned to a light duty job as a result of a prior injury. This raises a procedural problem in that claimant gave notice of the preliminary hearing under Docket No. 1,006,849. The hearing was conducted only in that docketed claim and Judge Avery’s Order bears only the single Docket No. 1,006,849. However, claimant filed a second claim on October 16, 2002, which allegedly covers the aggravation which is basis for the ALJ’s Order. That second claim was assigned Docket No. 1,006,850. In fact, claimant’s brief to the Board seems to acknowledge that fact. “Here, it is undisputed that the Claimant was suffering from a preexisting condition, the injury alleged in Docket No. 1,006,849.”<sup>1</sup> “Under Docket No. 1,006,850, the claimant suffered from an aggravation of a preexisting condition

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<sup>1</sup> Claimant’s Brief to the Board of Appeals at 4 (filed May 14, 2003).

as a combined result of working beyond restrictions and repeated bending, stooping, and twisting, not as the result of simply bending over.”<sup>2</sup>

Nevertheless, in its brief to the Board, respondent offers to waive this purported procedural defect.

If this Preliminary Hearing is to be treated as one conducted solely in regard to Docket No. 1,006,849, it seems apparent that Claimant failed to demonstrate his entitlement to additional benefits for injuries suffered on or about August 10, 2001. The persuasive evidence contained in the record of the March 28, 2003 Preliminary Hearing is to the effect that Claimant had recovered from the effects of any injuries suffered in August, 2001 and had been released from the care of Dr. MacMillan in March, 2002 with permanent work restrictions which were accommodated by Respondent, placing Claimant in an all together new job.

The issue which should have been presented to the Court on March 28, 2003 was whether Claimant had suffered additional injury as he performed his new job of “wash omasum” which would entitle him to additional treatment and benefits in workers’ compensation, or whether his need for additional treatment is instead the result of a degenerative condition of his spine which is aggravated by the normal activities of day-to-day living and thus outside the definition of “injury” found at K.S.A. 44-508(e). It was that issue which was decided by Judge Avery and which formed the basis for his award of compensation. His description of an accident is clearly in reference to Claimant’s testimony of bending over to pick something up in August, 2002, making his finding one in regard to the allegations of injury found at Docket No. 1,006,850, and not this claim in Docket No. 1,006,849.

In other words, strict adherence to procedural protocol would suggest that Judge Avery’s Order of April 2, 2003 should be vacated as it is not in regard to the claim for which a hearing was conducted on March 28, 2003.

Such a finding would likely lead the parties back to [a] Preliminary Hearing before Judge Avery in regard to Docket No. 1,006,850, where similar testimony would again be presented and Judge Avery would likely make the same finding of fact. Thus, Respondent asks this Court to waive the procedural shortcomings of this claim and enter a decision on the merits of

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<sup>2</sup> Claimant’s Brief to the Board of Appeals at 4 (filed May 14, 2003).

the question just posed, that being whether Claimant's need for treatment at this time is a result of injury which arose out of and in the course of his employment or whether it is the result of a personal condition which is aggravated by the normal activities of day-to-day living and thus not compensable in workers' compensation.<sup>3</sup>

Surprisingly, and to the Board's disappointment, claimant does not reply to respondent's offer to waive this alleged procedural defect, nor does claimant otherwise address the issue in his brief. Although claimant does not make any mention of the procedural problem, the caption of claimant's brief contains both docket numbers. The Board considers this to be an acknowledgment of the procedural error and an acceptance of respondent's offer to waive any objection to proceed to the merits of the claims. Accordingly, the Board will consider the issues raised in this appeal as if the two claims had been consolidated for hearing and the Order For Compensation entered in both docketed claims.

The issues raised in Respondent's Application for Appeals Board Review and in Respondent's Brief to the Appeals Board are:

1. Whether claimant met with personal injury by accident.
2. Whether claimant's alleged accidental injury arose out of and in the course of his employment.

In addition to the issues raised by respondent, claimant raises an issue concerning the Board's jurisdiction to review the ALJ's preliminary hearing order. Respondent contends that K.S.A. 44-534a(a) and K.S.A. 44-551 give the Board jurisdiction to review the issues it raised. Claimant acknowledges that:

"[T]he Board is permitted to review these issues under K.S.A. 44-534a(a)(2). However, the respondent does not allege that Judge Avery exceeded his jurisdiction in either its application or its brief. K.S.A. 44-551(b)(2)(A) clearly states that a review by the Board of a preliminary award 'shall not' be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Here, the respondent

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<sup>3</sup> Respondent's Brief to the Appeals Board at 7, 8 (filed May 5, 2003).

has clearly not made such an allegation, and review by the Board is prohibited by the statute.”<sup>4</sup>

### Findings of Fact and Conclusions of Law

Claimant's argument that the Board is without jurisdiction to review the ALJ's Order is without merit. K.S.A. 44-534a(a)(2) specifically provides that “A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employees employment . . . . shall be considered jurisdictional, and subject to review by the board.” A separate allegation that the ALJ exceeded his jurisdiction is, therefore, not required. “Furthermore, . . . the ALJ and the Board are not bound by technical rules of procedure and are to give the parties a reasonable opportunity to be heard . . . .”<sup>5</sup>

After reviewing the record compiled to date, the Board finds and concludes that the April 2, 2003 preliminary hearing order should be affirmed. The Board agrees that claimant suffered a work-related aggravation of his preexisting back condition. The Board is mindful of Dr. MacMillan's opinion that:

Mr. Renteria has degenerative disk disease at L4-L5, with an L5 spondylolysis. These are developmental and age related conditions which can only produce episodes of waxing and waning pain throughout adult life. The act of bending forward which Mr. Renteria alleges precipitated his most recent episode of discomfort should not be considered to constitute an injury. It is an act of daily living which we all perform several times daily without incident. The fact that Mr. Renteria's symptoms may have started at this point in time is not indication of causation with respect to his work activities. It is more a chronologic association with his work activities, namely the symptoms were going to start. They just happened to start while he was at work.<sup>6</sup>

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<sup>4</sup> Claimant's Brief to the Board of Appeals at 1, 2 (filed May 14, 2003).

<sup>5</sup> *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

<sup>6</sup> P.H. Trans., Resp. Ex. A at 2.

Nevertheless, Dr. MacMillan acknowledges that claimant's most recent episode of acute low back pain was brought on by his work activities.<sup>7</sup> In addition, Dr. Murati attributes claimant's current diagnosis to his series of work-related injuries that occurred on August 13, 2002 through September 25, 2002.<sup>8</sup>

The Board finds that the claimant, at a minimum, suffered acute exacerbations of his preexisting low back condition in August and September 2002 due to the repetitive bending, stooping and twisting he performed in the "wash omasum" job. These activities, together with the required lifting and pushing, combined to cause claimant's current acute exacerbation of his preexisting low back condition. As such, the claim is compensable as an aggravation.<sup>9</sup>

### **Award**

**WHEREFORE**, the Appeals Board finds that the April 2, 2003, Order For Compensation entered by Administrative Law Judge Brad E. Avery should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2003.

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BOARD MEMBER

c: Thomas R. Fields, Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>7</sup> P.H. Trans., Cl. Ex. 2 at 3.

<sup>8</sup> P.H. Trans., Cl. Ex. 1.

<sup>9</sup> See *Hanson v. Logan* U.S.D. 326, 28 Kan. App. 2d. 92, 11 P.3d 1184 (2000); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d. 178 (1984).